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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 702

UGO ROSSI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 41-49) is reported at 219 F. 2d 612.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1955. On March 7, the time for filing a petition for a writ of certiorari was extended to April 6, 1955, and the petition was filed

on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the trial court erred in submitting to the jury, for its consideration in determining petitioner's credibility as a witness, the question of petitioner's identity with the "Ugo Rossi" named in Italian records of conviction dating back some 25 to 35 years prior to trial.

3. Whether petitioner's perjurious statements in immigration and naturalization documents regarding criminal convictions could be inquired into for impeachment purposes after the subject had been opened up by petitioner himself on direct examination.

4. Whether the trial court's interrogation of petitioner and his witnesses deprived him of a fair trial.

STATEMENT

Petitioner was convicted of conspiracy to violate various laws relating to narcotics (count 1, R. 7-9) and of selling, concealing and facilitating the transportation of one kilo of heroin (count 6, R. 12, 577). He was sentenced to imprisonment for five years on each count, the sentences to run concurrently (R. 590). On appeal the judgment was affirmed.

The facts adduced at trial may be summarized as follows:

On four occasions between January 2 and April 23, 1953, undercover agents of the Federal Bureau of Narcotics purchased large quantities of opium and heroin from Laget, Sauzet, and Doe, named as codefendants in the indictment (R. 19, 26, 29-31, 34-36). During this period Laget was observed entering petitioner's apartment on one occasion and was met at the door by petitioner (R. 151, 152). Laget was also seen entering petitioner's apartment building on four other occasions (R. 150, 152-154).

Agent Zurlo testified that he met defendant Laget at a restaurant on the evening of April 23, 1953, for the purpose of purchasing a kilo of heroin (R. 37). They drove in Laget's car by a circuitous route to a point where, after circling the block, Laget saw another car in front of him. Laget said "There he is now" as the car, a green DeSoto bearing license number QC5689, whose sole occupant was the driver, pulled up on the west side of the avenue and parked. Laget parked his car, went over to the DeSoto, opened the door, leaned in and then emerged carrying a brown paper bag. He returned to his car, delivered the bag to the narcotics agent and received $6,500 therefor. (R. 37-40, 65-69.) The package contained one kilo of heroin (R. 39-40, 68, 220-222). Laget was taken into custody shortly thereafter (R. 115).

Government agents in the immediate vicinity at the time of the incident positively identified petitioner as the driver of the green DeSoto bearing license plates number QC5689 (R. 114, 115, 178,

179). One of them had seen petitioner twice before (R. 179, 180). About an hour later petitioner was found in front of his apartment house in the same automobile (R. 181, 192).

The defense was alibi (R. 300-444).

On direct examination, petitioner testified that in Italy in 1926, he, together with 200 other persons, had been convicted of a "conspiracy against the Fascist Regime", sentenced to five years' imprisonment and thereafter to confinement as a political prisoner (R. 413, 414). On cross-examination, he denied he had ever been convicted of any other crimes in Italy (R. 456). He admitted that his father's name was Roberto Rossi, that his mother's name Matilde Paterno Rossi, and that he had been born in Palermo, Italy, on December 13, 1901 (R. 466). Government counsel then introduced, over objection, petitioner's application for an immigration visa on which he had sworn that he had never been in prison (R. 458, 459). His petition for naturalization was also introduced, over objection, revealing that he had sworn that neither in the United States or any other country had he ever been arrested, summoned into court as a defendant, or "convicted, fined, imprisoned, or placed on probation" for any felony, misdemeanor or other breach of law or ordinance (R. 459-466). Petioner explained by saying that "In my conscience I felt that I had not committed any crime" (R. 463), and by insisting that he had relied on the advice of his lawyer at the time (R. 469).

Thereafter government counsel produced certified copies and translations of four records of convictions in Italy of one Ugo Rossi. The records were admitted into evidence over the objection of petitioner that having been denied by him, they had not been properly identified as relating to crimes committed by him (R. 479). The records were to the following effect (R. 488-492):

Exhibit 16a.

1. Ugo Rossi, the "son of the late Roberto", "17 years of age, from Palermo" was found guilty of doubly qualified theft for stealing chickens on the night of March 25, 1919. He was sentenced on May 28, 1919, to one year of "continuous cellular segregation" the execution of which was suspended by the Court of Appeals of the District of Palermo. (R. 491-492.)

Exhibit 17a.

2. Ugo Rossi, "son of Roberto, 17 years of age, from Palermo" was convicted in May, 1920, of breaking into a home on June 6, 1919, and stealing personal property. He was sentenced to two years and six months. (R. 492.)

Exhibit 15a.

3. On May 22, 1925, Ugo Rossi, "son of the late Roberto, 23 years of age, from Palermo" was convicted of "complicity corresponding to lesions with weapons" after being involved in a brawl in a restaurant on January 17-18,

1925. He was sentenced "to imprisonment for eight months and four days with the increase of one-sixth of the duration of the continous cellular segregation", reduced on appeal (Aug. 19, 1925) to four months. (R. 490-491.)

Exhibit 14a.

4. Ugo Rossi, "son of the late Roberto and son of Matilde Paterno, born at Palermo, December 10, 1901" was convicted in February 1929 for "complicity in qualified homicide" with premeditation (R. 488-489.)

With respect to these records, the judge instructed the jury that if it found that petitioner was the defendant named therein, it would go to his credibility as a witness (R. 567).

ARGUMENT

1. Petitioner argues that the evidence was insufficient to support his conviction since he was not seen to have handed the package to Laget (Pet. 20-22). The evidence, though in part circumstantial, was more than ample. There was direct evidence that petitioner had been in contact with the seller, Laget, prior to April 23rd, the date of the narcotic sale. (R. 151, 152.) As to the events of April 23rd, petitioner was positively identified by federal agents as the man driving the car and as the person contacted by Laget immediately prior to the sale (R. 114, 115, 178, 179). The place and manner of meeting suggested pre-arrangement

justifying an inference of an illegal purpose. (R. 37, 38.) Although Laget had not been searched prior to the meeting, he had been in the presence of the federal agent for quite some time and there was no sign of the narcotics and no transfer to the agent until after contact with petitioner. The package delivered to the agent after Laget returned from the car was too large to have been concealed on Laget's person before (see R. 67). As the court below pointed out (Pet. 43):

> Here the evidence far exceeded the minimum required by the application of the rule of circumstantial evidence and the instructions of the trial court on the subject were if anything too favorable to the defendant, whose defense was alibi.

See also *United States* v. *Pisano, et al.*, 193 F. 2d 355 (C. A. 7).

2. Petitioner contends (Pet. 24-31) that the trial court committed reversible error in admitting in evidence for impeachment purposes records of convictions in Italy of one "Ugo Rossi" after he (petitioner) had denied that he was the same person named in three of such records. Yet petitioner concedes (Pet. 25), as he must in view of the authorities,[1] that the fact that his name is identical with that appearing on the records is prima facie

[1] See *Hefferman* v. *United States*, 50 F. 2d 554, 557 (C.A. 3); *People* v. *Schanda*, 352 Ill. 36, 185 N.E. 183; *Ayers* v. *Ratshesky*, 213 Mass. 589, 101 N.E. 78; *Colbert* v. *State*, 125 Wis. 423, 104 N.W. 61; 1 Greenleaf on *Evidence*, sec. 43a; 9 Wigmore, *Evidence* (3rd ed.), sec. 2529.

evidence of identity. The evidence further showed that petitioner was born and lived in Palermo, Sicily, the residence of the person described in the records, that his father's name, Roberto, was the same as the parent listed in the records, and that his age at the time of each conviction was the same as that listed. (R. 466, 488-492.)

Petitioner did not rebut this presumption of identity. Rather, his recollection on redirect examination of being involved at age fifteen or sixteen with a group of boys when a chicken was taken (R. 483), served to buttress the presumption that he was the "Ugo Rossi", "17 years of age, from Palermo" found guilty of doubly qualified theft for stealing chickens. Since identity is a question of fact,[2] the court properly left the evidence before the jury to use or discount in determining petitioner's credibility as a witness. See *Hefferman* v. *United States,* 50 F. 2d 554, 557 (C. A. 3); *Boyd* v. *State,* 150 Ala. 101, 43 So. 204; *State* v. *Taylor* (S. Ct. Mo.), 274 SW 47.

Petitioner's argument directed at inconsistencies on the face of the records (Pet. 27-29) is unconvincing. Since the Ugo Rossi named in Exhibit 16 was given a suspended sentence in May, 1919, it was not impossible for him to have committed in June 1919, the offense mentioned in Exhibit 17, for which he was convicted in 1920. There is nothing to show that an appellate court would, as petitioner argues (Pet. 27-28), necessarily refer to prior con-

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[2] *Graham* v. *West Virginia,* 224 U.S. 616.

victions in deciding a case before it. As for the contention (No. 5, Pet. 28-29) that petitioner could not have committed the offense charged in Exhibit 17 because he was in the army at the time, or the offense charged in Exhibit 15 because he was in prison at that time (No. 7, Pet. 29), the dates of petitioner's military service are not documented by competent proof and the actual time served in prison does not appear on the face of the record.

These records were not inadmissible because the convictions occurred some twenty-five to thirty-five years before trial. Such evidence is remote only if it cannot reasonably bear on the present character of the witness. The record here was not introduced solely as evidence *per se* of petitioner's general character but more particularly to question his veracity in presently denying having been so convicted. The question of remoteness is discretionary and depends of the facts of the particular case. See *Michelson* v. *United States,* 335 U. S. 469; *Fire Ass'n. of Phila. et al.* v. *Weathered,* 62 F. 2d 78, 79 (C. A. 5).[3]

3. Petitioner, in an effort to show that it was error to probe into statements made in his visa and naturalization applications, relies on the general proposition that acts of misconduct not resulting in conviction are not the proper subject of cross-examination (Pet. 31-33). However, there can be

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[3] *Henderson* v. *United States,* 202 F. 2d 400, 405 (C.A. 6), cited by petitioner, is inapposite as the question raised there was not one of remoteness but whether the conviction involved moral turpitude.

no doubt that perjurious statements indicating a lack of veracity may properly be inquired into on cross-examination when the subject has been opened up by the witness himself on direct examination. This is made clear by the very decision upon which petitioner relies, *United States* v. *Provoo,* 215 F. 2d 531, 537, in which the Court of Appeals for the Second Circuit makes a distinction between misconduct cited to inflame or prejudice and misconduct showing a propensity to disregard the obligation of an oath. See 3 Wigmore, *Evidence* (3rd ed.), secs. 981-982.

4. It is further contended that the trial court's interrogation of petitioner and his witnesses deprived petitioner of a fair trial (Pet. 33-37). The record, including the references cited by petitioner, refutes that contention. The court acted, as it had the duty to do, to elicit the facts it deemed necessary to a clear presentation of the evidence. The trial was long, the witnesses numerous and the testimony lengthy, sometimes unresponsive, and given in both Italian and English. The nature of the crime charged and the defense offered necessitated care in the fixing of time, dates, and identifying factors. In the light of this and in view of counsel's objections, failure of the court to interrupt and clarify would have resulted in utter confusion. The impartiality of the trial judge is reflected in his charge to the jury (R. 568, 569):

> I have sought to avoid any comment which might suggest my personal views on the weight of the evidence, the credibility of witnesses,

the inferences to be drawn, or the importance of one phase or segment of the testimony as compared to another, and no comment made by me was intended to suggest my personal views.

You are not to assume that I have any view as to the guilt or innocence of the defendants. The determination of that question is your sole and exclusive responsibility.

* * * * *

During the course of the trial I had occasion to ask questions of some of the witnesses. You are to draw no inference from my questioning of the witnesses or that I had any point of view as to their credibility. The Judge has the right—and, indeed, it is his duty—to see to it that the facts are clearly presented, and the purpose was to clarify certain matters in the case.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1955.

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